



Bitterrooters for Planning

July 12, 2007
Ravalli County Board of Commissioners
Chairman James Rokosch
Kathleen Driscoll
Carlotta Grandstaff
Alan Thompson
Greg Chilcott
Ravalli County Courthouse
Hamilton, Montana 59840

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Ravalli County Commissioners

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RE: Board of Adjustment

On June 25, 2007 the newly appointed Board of Adjustment (BOA) conducted a hearing on a variance request, **VARIANCE REQUEST FROM THE INTERIM ZONING REGULATION (RESOLUTION 2038) BROOKS HOTEL, LOT 6-A, AP (R&G DEVELOPMENT)**. The hearing was a travesty that belies any conceivable attempt BOA members might have had at discharging their duties as prescribed by law. The cited justifications for the actions of the BOA are foreign to any rational thought process and were obviously designed to circumvent the 1 per 2 initiative passed overwhelmingly by the electorate in November of 2006. The blatant obfuscation of the facts related to this variance request was the most outlandish action anyone can imagine, a true blemish on the democratic process. The chairman of the BOA conducted himself in a professional and admirable way attempting to rationally deal with the 9 variance issues at hand. However, the other four members missed the mark, actually avoided the mark, totally. As a result of that incredible demonstration of incompetent avoidance of the law we are requesting two actions on the part of the Ravalli County Commissioners relative to the Ravalli County Board of Adjustment (BOA).

Our first request deals with the recent BOA decision on the **VARIANCE REQUEST FROM THE INTERIM ZONING REGULATION (RESOLUTION 2038) BROOKS HOTEL, LOT 6-A, AP (R&G DEVELOPMENT)**. We are asking that you, as county commissioners, appeal this recent decision by the BOA to grant the abovementioned variance. You are authorized to do so by the following statute:

76-2-227. Appeals from board to court of record. (1) Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment or any taxpayer or any officer, department, board, or bureau of the county may

present to a court of record a petition, duly verified, setting forth that such decision is illegal, in whole or in part, specifying the grounds of the illegality. Such petition shall be presented to the court within 30 days after the filing of the decision in the office of the board.

It is our contention that the BOA granting of the variance was capricious, short sighted and illegal for the following reasons;

1. MCA 76-2-221 Board of Adjustment states, "...the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the zoning resolution in harmony with its general purposes and intent." The decision of the BOA was not in harmony with the Interim Zoning resolution purposes and intent. The following is the wording of the zoning resolution:

NOW, THEREFORE, an interim zoning regulation is hereby adopted as an emergency measure in order to promote the public health, safety, and general welfare pursuant to Montana Code Annotated 76-2-206. This interim zoning regulation shall be applied to all of the unincorporated area of Ravalli County.

No preliminary plat subdivision applications may be approved that provide for the building of residences at a higher density than one dwelling per two (2) acres. This regulation applies to all subdivision preliminary plat applications that have not yet been approved or conditionally approved. In addition to this density requirement, all other applicable subdivision and zoning requirements must also be met prior to review for approval.

This interim zoning regulation shall provide for the appointment of a Board of Adjustment Pursuant to Montana Code Annotated 76-2-221, (1). and in the regulations and restrictions adopted pursuant to the authority of this part shall provide that the board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the zoning resolution in harmony with its general purposes and intent and in accordance with the general or specific rules of this part.

(2) The board of adjustment shall adopt rules in accordance with the provisions of any resolution adopted pursuant to this part. Meetings of the board of adjustment shall be held at the call of the chairman and at such times as the board may determine. Such chairman or in his absence the acting chairman may administer oaths and compel the attendance of witnesses.

This interim zoning regulation shall become effective upon passage, and shall expire one (1) year from the date it becomes effective, unless the county government or voters extend the interim zoning regulation for one (1) additional year.

Zoning Variances may be applied for when, due to special circumstances or conditions such as exceptional topographic conditions, narrowness, shallowness, or the shape of a specific piece of property, the literal enforcement of the provisions of the Ravalli County Land Use Regulations would result in peculiar and exceptional practical difficulties to, or exceptional and undue hardship upon, the owners of the property.

STANDARDS FOR VARIANCE. The Board of Adjustment shall not approve a variance unless it makes findings based upon the evidence in each specific case that:

- (A) the variance is consistent with the general purposes of the interim zoning regulation, and will conform to all of the following requirements and stipulations; and

- (B) strict application of the Code requirements would result in great practical difficulties or hardship to the applicant (not mere inconvenience) and prevent a reasonable return on the property; and
- (C) the variance is the minimum deviation from such requirements that will alleviate the difficulties/hardship, and allow a reasonable return on the property; and
- (D) the plight of the applicant is due to circumstances not of his/her own making; and
- (E) the circumstances engendering the variance request are peculiar and not applicable to other property within the district; and
- (F) the variance will not alter the essential character of the area where the premises in question are located nor adversely affect the public health, safety and/or welfare; and
- (G) the variance will not in any manner place the subdivision in nonconformance with any adopted zoning regulation or comprehensive plan; and
- (H) the variance will not contribute to the emergency situation that exists in Ravalli County as defined in the interim zoning regulation; and
- (I) the variance is in the public interest.

As you will note the resolution states, "The Board of Adjustment shall **not** approve a variance unless it makes findings based upon the evidence in each specific case. This means that if any **one** of the nine criteria receives a negative conclusion, that the variance **must** be denied.

The planning staff found the application for variance did not meet the test for four of the criteria, (criteria A., B., C., and E.). Though planning staff gave a positive conclusion for the remainder of the criteria, we also question several of those conclusions. A review of the facts relative to those positive conclusions appears opinionated and conditioned on their interpretations of various factors. (We have attached a list of the criteria and staff conclusions.)

Criterion F which was given a positive conclusion by staff states, "The variance will not alter the essential character of the area where the premises in question are located, nor adversely affect the public health safety and/or welfare." Staff rationale is, if this variance is approved, their subdivision review will address the adverse effects, if any, on public health and/or welfare when they evaluate the six criteria under subdivision review. Their theory being that any impacts on this zoning variance criterion would be mitigated with their subdivision review. Variances are not conceptual nor are they open to mitigation. In addition, staff believes that when a development connects to a wastewater treatment system such as the Corvallis Sewer District that the potential for contributing to pollution of ground and surface water is mitigated. Again, variances are not conditioned on mitigation. In any event, connecting to a sewer treatment facility in any unincorporated area does not mean that the emergency that exists for ground and surface water pollution is resolved. We believe that additional study needs to be undertaken and completed in order to determine if, in fact, various sewer treatment facilities throughout the valley are in compliance with the environmental standards and what, if any, cumulative effect their discharges are having on the pollution concerns that we have.

The public health safety and/or welfare emergencies in Ravalli County have not been studied or addressed in accord with the Interim Zoning resolution and the following Montana Statute:

76-2-206. Interim zoning map or regulation. (1) The board of county commissioners may adopt an interim zoning map or regulation as an emergency measure in order to promote the public health, safety, morals, and general welfare if:

(a) the purpose of the interim zoning map or regulation is to classify and regulate those uses and related matters that constitute the emergency; and

(b) the county:

(i) is conducting or in good faith intends to conduct studies within a reasonable time; or

(ii) has held or is holding a hearing for the purpose of considering any of the following:

(A) a growth policy;

(B) zoning regulations; or

(C) a revision to a growth policy, to a master plan, as provided for in 76-1-604(6) and 76-2-201(2), or to zoning regulations pursuant to this part.

(2) An interim resolution must be limited to 1 year from the date it becomes effective. The board of county commissioners may extend the interim resolution for 1 year, but not more than one extension may be made.

Criterion A.

It is important to note that even though staff gave a negative Conclusion to Criterion A, they included a statement, "1. The variance request is consistent with the general purposes of the interim zoning regulation." This is a false statement. The truth is, the general purpose of the interim zoning regulation is to prevent any development in excess of 1 dwelling per 2 acres, on a temporary basis. This variance blatantly attempts to circumvent that purpose and the planning staff should have pointed that out; it is the responsibility of the planning staff to provide such information.

Criterion F.

A key consideration for this criterion analysis is underscored in "Finding of Fact 5.", where staff states, "Given the information available, the Planning Department has not yet identified any major impacts on public health, safety, or welfare that would be created by this development."

The required information is the key issue for this or any other analysis. The County Commissioners and, in turn, the Planning Department is charged with the responsibility for obtaining and accumulating the information called for in the interim zoning regulation, information including whatever studies and data are necessary to determine and provide for the protection of the public health, safety and general welfare of the citizens of Ravalli County. The resolution states:

"Whereas, the citizens of Ravalli County have the authority, pursuant to Montana Code Annotated Section 7-5-131, through initiative to adopt an interim zoning regulation to protect the public health, safety and general welfare where an emergency situation exists."

The citizens, in passing the initiative last November, have strongly stated that interim zoning is needed to provide us with the mechanism to protect what we deem critical, our health,

safety and welfare. However, the quantification of the data necessary to accurately address the emergencies spelled out in the interim zoning resolution has not been completed. The planning staff should have said so and confirmed that, because of the temporary lack of information, there is no alternative other than to say that (relative to a variance request) the potential for impacts to the emergency conditions cited in the interim zoning initiative are unknown. Further, until such time as those issues are studied and addressed, this variance request is not in the public interest. The planning department does not have the right to gamble on major impacts to the public nor, by their silence, to acquiesce to granting a variance based on no information. The planning department is charged with the responsibility, and must do their job, to acquire the information on which to identify and quantify all impacts of development.

Staff Conclusions of Law for Criterion F. states, "If the variance is approved, potential impacts on public health, safety and welfare will be mitigated through the subdivision review process." We want to point out that zoning and subdivision regulations are two separate and distinct regulatory issues. Zoning regulations deal with land use. This variance is a request to deviate from a land use regulation, not a subdivision regulation. The primary purpose of zoning is to segregate uses that are thought to be incompatible. In practice, zoning is used as a permitting system to prevent new development from harming existing residents, businesses, resources and infrastructure, to name just a few. On the other hand, subdivision regulations are local ordinances which specify the standards and conditions under which a tract of land can be subdivided. Subdivision regulations do not control land use, but do control how to develop the land in compliance with other regulations such as zoning or a comprehensive plan. Subdivision regulations can be considered specifications that determine how the land is used in conformity with other guiding principles such as zoning. Originally directed at street layout and construction specifications, subdivision regulations across the country now stipulate the general design of street lighting and signs, sidewalks, sewage disposal, and water-supply systems while some require the dedication of land for schools, parks, and other community facilities within the subdivision. Impact fees are a relatively new additive to subdivision regulations.

The conclusion should be: "This variance is not consistent with the general purposes of the interim zoning regulation and does not conform to the criterion listed in Criterion A as it relates to the impacts on public health, safety and welfare."

Staff must know that you cannot mitigate a variance or zoning deviation by conjecture nor that you can mitigate a land use requirement with a subdivision regulation.

As for criterion G., staff states the variance will not in any manner place the subdivision in nonconformance with any adopted zoning regulation or comprehensive plan. Their conclusion was positive. The staff representative stated:

"This board tossed this question around in our earlier meetings as to what this meant. Does any adopted zoning regulation include the interim zoning regulation? Well not really! We've consulted with the county attorney's office and we've determined that this means any other adopted zoning regulation and there aren't any other adopted zoning regulations other than

this 1 per 2. Another way you can look at it is by getting a variance through the variance process outlined in the interim zoning regulation that would be the way that it complied with this regulation so it would not contradict this regulation. The comprehensive plan is another term for the growth policy. So we have a positive finding for G." So says the planning staff.

Criterion G., states, "The variance will not in any manner place the subdivision in nonconformance with any adopted zoning regulation or comprehensive plan." It does not say, "...any other adopted zoning regulation or comprehensive plan." There is no ambiguity in this language.

We vigorously argued and continue to stress the point that the interim zoning initiative is a process, a temporary condition that provides for studies of the emergencies and the development of zoning regulations to address and mitigate those emergency situations. As the author and supporter of the initiative we contend the BOA has no role to play in granting or even considering variances to the 1 per 2 initiative. Mr. Beal argued to the contrary and wrote an opinion that the BOA has a role in reviewing variances to the initiative. But now the planning staff and the county attorney have stated that criterion G means any other adopted zoning regulation not the 1 per 2 that this criterion is being reviewed under.

In actuality the variance will place the subdivision in nonconformance with the adopted interim zoning resolution. To reiterate, "No preliminary plat subdivision applications may be approved that provide for the building of residences at a higher density than one dwelling per two (2) acres." The regulation is clear and an educated, experienced planning staff should have fortified this fact, resulting in a negative conclusion.

Criterion H. "The variance will not contribute to the emergency situation that exists in Ravalli County, as defined in the interim zoning regulation." This criterion received a positive from planning staff. Planning staff compared this development to Aspen Springs and other developments with "hundreds" of units proposed, and decided, based on those comparisons, that the impact would be small if any. This statement is false and misleading! The true picture is found in cumulative data. These impacts are unknown and until such studies of the various emergencies are conducted as provided for in MCA 76-2-206 this criterion should have also received a negative conclusion. The old adage that when a 5 gallon bucket is full it only takes one milliliter to make it over flow is true. The bucket may or may not be full right now but how do we know until we address the studies called for. The people who voted for the interim zoning initiative have said they are not willing to allow uncontrolled development to continue, that they feel the finite resources of this valley have been seriously tested if not permanently damaged, and that they will not allow those infringements on the quality of life to continue. The people have said they want the emergency issues studied, seriously studied not just given lip sync or mention here and there. They have said before we go any further with any development, we need to develop zoning regulations in concert with the study of the emergencies outlined in the interim zoning initiative. This Criterion should have received a Negative Staff Conclusion.

Criteria I., "The variance is in the public interest.", received a Positive staff conclusion. Their rationale for such a conclusion is certainly flawed as it is subjective and not in concert with

what the general public considers "*in the public interest*." Public interest is a term with many meanings. The staff conclusion is a mystifying one which seems to be developed from vagaries resulting from a cursory look at the, "Whereas of the Interim Zoning Resolution, the goals and objectives of the Growth Policy and the six Subdivision Review criteria." Staff conclusion was that in general terms, this development (variance) is in the public interest. However, the variance is not in the public interest. It is in conflict with the entire concept of interim zoning which is in the public interest. This variance is solely in the developers' interest. But the developer should and must comply with the interim zoning resolution which is temporary in nature and restricts development to 1 dwelling per 2 acres.

It is well to note that Planning Staff, Planning Director Karen Hughes nor Deputy County Attorney Alec Beal offered any comment relative to the comments of various BOA members in their determination of "Findings of Fact." As you listen to the cd the lack of guidance and/or correction as to needed content is obvious. The BOA member discussions are simply uncontested ramblings that have no merit relative to the necessary data required to grant such a variance.

Removal of the BOA members for cause.

The second request is that you as commissioners remove all sitting members of the BOA and appoint new members that truly reflect a cross section of the citizens of our county. Appoint citizens who will sit as jurors, determining the facts not manipulating them, and reaching decisions that are not at odds with the rule of law. Establish reasonable criteria for member selection. Provide some training for the new members explaining their role and the approach they should take in their participation. The recent action, approval of and granting a variance to R&G Development for the **Brooks Hotel, Lot 6-A, AP**, by the BOA, was an action so egregious, blatantly unlawful and corrupt that it defies description. MCA 76-2-222 provides for the removal of BOA members.

76-2-222. Membership and term of board members -- vacancies. (1) The board of adjustment consists of five members, each to be appointed for a term of 2 years and removable for cause by the board of county commissioners upon written charges and after public hearing. The board of county commissioners may designate the same persons to act as members of the board of adjustment for unincorporated portions of the jurisdictional area as may be appointed by the municipality within the jurisdictional area under provisions of 76-2-321 through 76-2-328.

(2) Vacancies must be filled for the unexpired term of any member whose term becomes vacant.

We ask that you remove the current BOA members and appoint new members. The current members with the exception of Chairman Phil Connelly, have demonstrated that they will ignore the law and its procedures in guiding them to a reasonable finding of fact in analyzing variance data. This will be confirmed by you as you listen to the audio cd.

At the time of this writing there is no written report of this BOA meeting. The references available here are contained on an audio cd of the entire meeting, 2 hours 53 minutes and 39 seconds. We have listened to that cd numerous times and are shocked at the questions and motions put forth by BOA committee members.

Criterion B.

For example, the first motion for an action was made by Lee Foss. His discussion of the item begins at 2:04:17 on the cd and he discusses for the second time "I'm going to go back to the weed thing" He discusses the hardship placed on the developer because he will have to mow the weeds, "that someone will have to maintain the property and that most people don't like to mow 2 acres, 1 acre or even a half acre let alone three acres" He then made the motion to change Criterion B to positive because of the maintenance hardship placed on the developer. Then the BOA decided to point out their "Findings of Fact" for each Criterion as they addressed them. Lee Foss stated that "There is water on two sides of the property, 3 acres of weeds and a large financial outlay for a long period of time..... those would be the reasons I would object to the findings of the planning board or planning staff."

Criterion C.

The discussion begins at 2:23:36 on the cd.

A motion was made at 2:41:42 on the cd, to accept the staff recommendations for Criterion F., G., H., and I. There was no discussion, there were no questions. The motion was approved. The tone of the meeting on the audio cd is one of perplexing actions taken by BOA members in their obvious quest to grant this variance at any cost. Listen to the audio cd and we believe you will come to the same conclusion that we have. The ramblings of BOA members demonstrate they are not up to the task of being unbiased juror type board members. They obviously had a preconceived understanding that they would approve the granting of this variance.

Granting this variance request is a slap in the face of everyone who voted for the 1 per 2 initiative. This action by the BOA is so egregious that it warrants your immediate attention. The actions of the BOA in granting this variance negates the interim zoning initiative because it says to any developer, just submit any variance and we will approve it. It is truly a symptom of long entrenched special interests that care nothing for the rule of law and the constitutional rights of citizens. These special interests have long held a narrow-minded view that profit trumps everything. Constitutional protections for individuals have long been ignored in favor of profits for a select few. This county must rise up against these insidious actions and place democratic principles once again in the forefront. We can't emphasize enough the danger of allowing this type of thing to continue let alone exist. These types of actions and the individuals who participate in and condone them cannot be allowed to continue. It threatens the very principles of democracy.

Thank you for your prompt attention to these two matters. We would appreciate your response to this letter as soon as possible in the event we may need to take another course of action.

Sincerely,

Stewart Brandborg
President BFP

Phillip Taylor
Member Director